

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 US AIRWAYS, INC., IN ITS CAPACITY :

4 AS FIDUCIARY AND PLAN :

5 ADMINISTRATOR OF THE :

6 US AIRWAYS, INC. EMPLOYEE : No. 11-1285

7 BENEFITS PLAN, :

8 Petitioner :

9 v. :

10 JAMES E. McCUTCHEEN, ET AL. :

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12 Washington, D.C.

13 Tuesday, November 27, 2012

14

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:02 a.m.

18 APPEARANCES:

19 NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of
20 Petitioner.

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23 United States, as amicus curiae, in support of
24 neither party.

25 MATTHEW W.H. WESSLER, ESQ., Washington, D.C.; on behalf

1 of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-1285, US Airways v. McCutchen.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

ERISA permits plan fiduciaries to seek appropriate equitable relief to enforce the terms of the plan.

Six years ago, this Court, in Sereboff, concluded that reimbursement actions by ERISA plans, such as the one at issue here, seek equitable liens by agreement. And because the plan's claim here is one for an equitable lien by agreement, that means one parcel of equitable defenses, those derived from unjustment enrichment, offer no help to Respondents.

JUSTICE SOTOMAYOR: Mr. Katyal, if you go to equity, why aren't you bound by equity?

MR. KATYAL: We certainly are, Justice Sotomayor, bound by equity. Our contention is not that, once you say the magic words "equitable lien by agreement," that somehow transforms into a "we win" as

1 plaintiffs at all.

2 JUSTICE SOTOMAYOR: Well, but that's exactly
3 what your bottom line is, which is you have someone else
4 do the work for you and you don't pay them.

5 MR. KATYAL: Quite to the contrary, Justice
6 Sotomayor, our position is that the rules of equity bind
7 equitable liens by agreement, just as they bind anything
8 else. We're not trying to say that the equity
9 doesn't apply --

10 JUSTICE SOTOMAYOR: So why does your lien
11 have priority to the attorney's lien that is normally
12 created at the commencement of the litigation? Why is
13 the attorney bound by the agreement you signed with the
14 beneficiary?

15 MR. KATYAL: So our position is that the
16 attorney doesn't -- there is no lien created with the
17 attorney; that, once Mr. Sereboff signed -- entered into
18 an agreement with US Air, that agreement said --
19 provided for 100 percent reimbursement rights.

20 And there is no -- essentially, what
21 happened is Mr. Sereboff -- excuse me -- Mr. -- Mr.
22 McCutchen double-promised his money. He promised it
23 first to -- first to the US Airways plan, and then he
24 promised it to -- to his attorneys.

25 And that's a problem that he might have with

1 his attorneys, although, as I understand the facts here,
2 maybe that debt has been forgiven, but it is not
3 something that creates an independent lien on the money
4 that's at issue here.

5 That is, the rules in equity say that it is
6 the agreement that controls -- when we're talking about
7 an -- when we're talking about an equitable lien by
8 agreement --

9 JUSTICE GINSBURG: With Sereboff, that
10 you -- you referred to, that -- that certainly describes
11 the lien you rely on, but there's a footnote toward the
12 end that leaves open the make-whole doctrine and, I
13 assume, also the common fund doctrine, so -- so it's --
14 it's an open question.

15 MR. KATYAL: Right. So our position is not
16 that Sereboff's letter controls this case. We do think
17 the reasoning of Sereboff essentially does decide the
18 question because what Sereboff said, Justice Ginsburg --
19 and this is at page 368 of the opinion in the text -- it
20 said -- the Sereboffs had argued the make-whole
21 doctrine.

22 And the -- in response, what this Court said
23 is, quote, "Mid Atlantic's claim is not considered
24 equitable because it is a subrogation claim.
25 Mid Atlantic's action qualifies as an equitable remedy

1 because it is indistinguishable from an action to
2 enforce an equitable lien established by agreement of
3 the sort epitomized by our decision in Barnes.
4 Mid Atlantic need not characterize its action as a
5 freestanding action for equitable subrogation.
6 Accordingly, the parcel of equitable defenses the
7 Sereboffs claim accompany any such action are beside the
8 point." Beside the point.

9 And our position is, once the Court has
10 decided that the type of action that is at issue here is
11 an equitable lien by agreement, the relevant doctrine --
12 and this is a further answer to you, Justice Sotomayor --
13 that the Court is to look to is how are equitable liens
14 by agreement evaluated in equity?

15 And those rules in equity say that, again,
16 the general rules of equity apply and govern that; but
17 the one place -- the one set of defenses that aren't
18 governed, are those that sound an unjust enrichment.

19 JUSTICE KENNEDY: I -- I recognize that
20 we're talking about a matter of Federal law here. What
21 about the law of most of the States?

22 Suppose there's an agreement with an insurer
23 and an insured, that says the insured gets 100 percent
24 of the proceeds. I would think that the law of most
25 States gives a superior lien to the attorney for the

1 contingent fee, notwithstanding the agreement.

2 I'm not sure of that. It's just an
3 assumption.

4 MR. KATYAL: That -- that is true, in some
5 subrogation States. However, even with respect to that,
6 when you have -- as long as it's not abrogated by
7 statute or something like that. But if you simply have
8 an agreement by an insured and it provides for 100
9 percent reimbursement and abrogation of the common fund,
10 even there, Justice Kennedy, the -- the agreement is
11 enforced.

12 So State Farm v. Clinton, which is a case
13 cited in our brief, as long as -- as well as the Dobbs
14 case and other decisions -- the Arkansas Supreme Court
15 in 1969, the Arkansas court in 1931 -- have all said
16 that, if you have an insurance agreement that abrogates
17 the common fund doctrine, that that agreement is
18 enforced.

19 And, here, of course, we're dealing --

20 JUSTICE GINSBURG: Where is that
21 abrogation -- where is that abrogation in this -- not
22 the plan description, but the plan itself -- what clear
23 language in the plan bars the -- the --

24 MR. KATYAL: Justice Ginsburg, the -- the
25 district court at pages 30A to 32A of the petition

1 appendix had two pages that found the agreement clear
2 and unambiguous with respect to abrogation of the common
3 fund doctrine. And the plan itself is found at Joint
4 Appendix page 20.

5 That finding by the district court was never
6 appealed to the Third Circuit. It was not appealed to
7 this Court. And, indeed, the brief in opposition
8 conceded this issue.

9 JUSTICE GINSBURG: But that --

10 JUSTICE KENNEDY: That -- that's the summary
11 of the plan that's at A20. That's not the plan --

12 MR. KATYAL: Yes. The summary plan
13 description is at page --

14 JUSTICE GINSBURG: I'm asking about the plan
15 itself because the plan controls if there's a
16 discrepancy.

17 MR. KATYAL: Exactly. And so the plan
18 itself was submitted, I believe, a few days ago. The
19 Respondents have now made an issue of it.

20 JUSTICE GINSBURG: Yes. And I -- and I
21 don't -- you -- you make a distinction between
22 reimbursement clause and the subrogation clause. And
23 this -- as far as I can tell from the plan, is no
24 reimbursement clause.

25 The only one that's there is labeled

1 "subrogation." And I looked at what's in the plan, and
2 I don't see language that clearly abrogates the common
3 fund.

4 MR. KATYAL: Your Honor, I suppose that --
5 that they could have made this an issue when they
6 appealed the district court's finding on this. They
7 didn't. And, indeed, there was discovery --

8 JUSTICE KENNEDY: Well, I mean, you -- you
9 want us to decide a case without looking at the plan?

10 I have before me the same language that I
11 believe Justice Ginsburg is looking at, and I think
12 she's quite correct, that the word "abrogation," of
13 course, is not used, but neither is the concept.

14 JUSTICE SCALIA: I didn't think we took this
15 case to review the plan. Is -- is that what the Supreme
16 Court took the case for, to say what this particular
17 individual plan said?

18 MR. KATYAL: Absolutely not, Justice Scalia.

19 JUSTICE SCALIA: Had that -- had that point
20 been raised, we would not have taken the case.

21 MR. KATYAL: And much to the -- and much to
22 the contrary, Justice Scalia, exactly, this is the way
23 that they framed the brief in opposition. The question
24 presented is this: "Whether a seriously injured ERISA
25 beneficiary must reimburse his ERISA plan for

1 100 percent of his medical expenses simply because the
2 plan language so provides."

3 JUSTICE KENNEDY: Well, "simply because the
4 plan language." I mean, obviously, we have to look at
5 the plan language to see what the -- you're -- you're
6 relying on the plan language. And you cite the summary,
7 but you don't cite the main plan.

8 MR. KATYAL: Two things, Justice Kennedy.
9 First, that brief in opposition goes on to say that that
10 plan was clear with respect to the common fund doctrine
11 and others at page 5.

12 But, second, if you're concerned --

13 JUSTICE SOTOMAYOR: Counsel, are you
14 conceding --

15 JUSTICE SCALIA: I'm sorry. Maybe --

16 JUSTICE SOTOMAYOR: -- the plan doesn't say
17 it?

18 JUSTICE SCALIA: Excuse me, please. The
19 second point?

20 MR. KATYAL: The second point is, even if
21 you are concerned about any discrepancy, point -- 4.2 of
22 the actual plan itself -- and this is page 22 of the PDF
23 that was submitted by -- lodged by my friends on the
24 other side a few days ago -- has essentially an
25 anti-Amara clause in it.

1 It says that the benefits that are provided
2 under the plan are those put forth in the summary plan
3 description. So there is no discrepancy between the SPD
4 in the plan in this case, unlike in Amara where there
5 very well was a discrepancy.

6 So here --

7 JUSTICE SOTOMAYOR: I'm sorry, the phrase
8 that you just read says that the benefits are the same.
9 It doesn't say that the reimbursement and subrogation
10 language are the same.

11 So go back to Justice Ginsburg's question
12 and point out in the plan what words you're relying
13 upon, not the summary, but the plan.

14 MR. KATYAL: So the plan has, in 4.7, two
15 things. It has, "The plan" -- quote, "The plan shall
16 have the right to recover from any participant the
17 amount of any benefits paid by this plan for expenses
18 which were recovered from or paid by a source, other
19 than this plan."

20 And then later, in 4.6, it says,
21 participants are -- quote, "are obligated to avoid doing
22 anything that would prejudice the plan's right of
23 recovery."

24 So I don't think that there is any
25 discrepancy, Justice Sotomayor. And to the extent that

1 this Court were concerned about it, there were 4 years
2 for them to have made this an issue, but this is just
3 about as procedurally barred as -- as anything --

4 JUSTICE BREYER: So if I were -- if I were
5 Joe Smith, and a plan -- the plan pays me 100 -- I have
6 medical expenses of \$100,000. And, actually, the --
7 the -- there was a driver who caused this problem. And
8 later, I collect 100,000, but I have to pay 50,000 to
9 get the 100,000.

10 So I am left with 50,000 net because I had
11 to pay my lawyers, I had to pay expert witnesses, there
12 were a lot of different things I had to pay. I'm left
13 with 50,000 now. So in comes the plan and says, we
14 want 100,000. I say, what? Then I look at the
15 language. The language allows them to get back expenses
16 which were recovered from the third-party.

17 I didn't recover 100,000 from the
18 third-party. I recovered 50,000 from the third-party
19 because it cost me 50 to get the 100.

20 Now, if I were a judge and listening to
21 that, I'd say, assuming they wanted a reasonable
22 interpretation of this language, it sounds pretty
23 reasonable to me.

24 MR. KATYAL: All right. And,
25 Justice Breyer, if you were the district court judge in

1 this case, I suppose you could have reached that result.
2 The district court here --

3 JUSTICE BREYER: It's a little tough, since
4 nobody had the plan.

5 MR. KATYAL: Well, they -- they had the
6 summary plan description, and they did not make an
7 issue of it. They had all sorts of discovery
8 requests, but never made a request for that --

9 JUSTICE BREYER: All right. But, I mean,
10 wouldn't the normal result of such a case, like any
11 contract case, where you have language, even if it was
12 the word "any," it doesn't mean wheat grown on Mars,
13 okay?

14 And so you'd say -- if it says you can
15 recover anything, that "any expense," it means, yes, you
16 can recover that which was paid, but not money that you
17 had to pay to get the amount paid.

18 MR. KATYAL: Justice Breyer, we absolutely
19 agree that a plan could be written in order to
20 embrace --

21 JUSTICE BREYER: But this is a plan that
22 they wrote and that US Air --

23 MR. KATYAL: -- but I think it would be
24 highly unusual for this Court, indeed, I think,
25 procedurally unavailable for this Court to --

1 JUSTICE SCALIA: Counsel, I guess your
2 opponent could have raised that point.

3 MR. KATYAL: Absolutely.

4 JUSTICE SCALIA: And didn't raise it.

5 MR. KATYAL: Absolutely.

6 JUSTICE SCALIA: And we took this case on
7 the assumption that there is an issue of law involved --

8 JUSTICE BREYER: All right. So I can --

9 JUSTICE SCALIA: -- and not -- not on the
10 assumption that --

11 JUSTICE BREYER: What is the issue of law?

12 The issue of law is what happens if we have a plan which
13 says, Joe Smith, my employee, if you have to spend
14 \$90,000 to get back 92,000, you have to give us back all
15 92, even though you only have 2 in pocket. And we are
16 supposed to assume that's what the contract said. Is
17 that right?

18 And then -- and then we say, now, can you
19 override that with the principle of equity? Is that the
20 issue you see before us?

21 MR. KATYAL: So, again, we're not overriding
22 with the principle of equity. We're saying that the
23 rules of equity, if they have in the plan an abrogation
24 of the common fund, as that is here, in the way this
25 case comes to the Court, then that is what settles the

1 question.

2 Now, you could have a Sereboff plan, which
3 says the reverse, which says, we're going to have a
4 common fund doctrine and avoid that problem at the
5 outset. The parties evaluate the valuation of the
6 transfer of assets at the outset, and that's what
7 controls. And if they want to buy into the common fund,
8 as this Court said in Sereboff, that's absolutely
9 enforceable.

10 And so it's not a contract around, Justice
11 Sotomayor, doctrines of equity. It's simply a
12 reflection of the general rule that, in equity, if --
13 when we're talking about equitable liens by agreement,
14 it is the agreement that controls, that starts the ball
15 game.

16 CHIEF JUSTICE ROBERTS: Was the plan
17 available to the employee at any time before this
18 litigation?

19 MR. KATYAL: Sure. If they had asked for
20 the plan, it could have been provided to them. They
21 have --

22 CHIEF JUSTICE ROBERTS: Are they -- are they
23 advised that they can ask for the plan?

24 MR. KATYAL: I -- I'm not quite sure about
25 that. I will look into that and try and get you an

1 answer on that.

2 JUSTICE SOTOMAYOR: I thought it took most
3 of the litigation for the plan to be provided.

4 MR. KATYAL: Justice Sotomayor, at the
5 outset, they asked for the summary plan description or
6 the plan. The summary plan description was provided.
7 Only --

8 JUSTICE SCALIA: You say, "they." I assume
9 you mean their lawyer?

10 MR. KATYAL: Their lawyer.

11 JUSTICE SCALIA: This is not -- you know, an
12 ignorant layman who knows nothing about the law.

13 MR. KATYAL: That's correct.

14 JUSTICE SCALIA: The lawyer, you say, did
15 not ask for the plan.

16 MR. KATYAL: And -- and I should say, the
17 minute that US Air found out that a tort -- a
18 plaintiff's lawyer was hired, they sent a letter to that
19 lawyer saying, we assert a right of reimbursement.

20 JUSTICE KAGAN: But, Mr. Katyal, could I ask
21 you about the legal argument that you are making, the
22 distinction you are making between reimbursement
23 agreements and subrogation agreements, which you
24 think -- seem to think is critical here. And -- you
25 know, once you put it in one box, rather than another,

1 some result follows -- different results follow.

2 MR. KATYAL: Yes.

3 JUSTICE KAGAN: So -- so how do you know
4 whether you have a reimbursement agreement or a
5 subrogation agreement? And what follows from that
6 categorization?

7 MR. KATYAL: So, Justice Kagan, there are
8 two very distinct rights. Subrogation is the right to
9 stand in someone else's shoes. And so the insured --
10 the plan says, we are going to inherit all of the
11 benefits and burdens of the insured in bringing an
12 action. It's a vicarious -- it's a kind of vicarious
13 notion.

14 Reimbursement's an entirely different
15 concept. It's the idea that, look, we're not obligated
16 to give you this money because we're not at fault in
17 this accident, but we're going to essentially advance it
18 to you, but you've got to reimburse us for it. And
19 so --

20 JUSTICE KAGAN: So if this were a
21 subrogation agreement, what would follow?

22 MR. KATYAL: So if it were a subrogation
23 agreement, I think my friend's case on the other side
24 gets a lot stronger because there are subrogation cases
25 that -- that have different rules.

1 But when you talk about reimbursement, which
2 is not the right to stand in someone's shoes, but a
3 first priority absolute agreement between the parties to
4 get money, it's just simply a dispute about that money.
5 And you can't --

6 JUSTICE KAGAN: So if your friend's argument
7 would get a lot stronger if it were a subrogation
8 agreement, how do we tell that this agreement is a
9 reimbursement agreement, rather than -- are we supposed
10 to just take that because that's the way the Court --
11 it's come to us? Or -- or is there an argument about
12 why there is a reimbursement?

13 MR. KATYAL: There is an argument. And,
14 indeed, all I think you have to do, Justice Kagan, is
15 look at what happened in Sereboff because, in Sereboff,
16 you had essentially the same thing, a plan that had both
17 a reimbursement provision and a subrogation provision.
18 And the -- the beneficiaries in Sereboff were saying,
19 hey, this is subrogation, this is subrogation.

20 And the language that I've read to
21 Justice Ginsburg at page 368, as well as earlier
22 language in the opinion, said, no, this is actually a
23 claim for an equitable lien by agreement that does not
24 sound in subrogation, that sounds in reimbursement.

25 And so all you have to do here is precisely

1 what this Court unanimously did in Sereboff, which is to
2 say, look at the nature of the action, is this an action
3 that seeks personal liability, does it specify a
4 particular fund, the typical hallmarks of an action for
5 an equitable lien by agreement; and, if those are
6 present, as they are here, that is enough.

7 JUSTICE ALITO: Are you, in effect, asking
8 for a windfall because Mr. McCutchen and his attorneys
9 didn't understand what ERISA means in this context?

10 If they understood that things would work
11 out the way you think they should work out and they saw
12 that the limits of the insurance policies against which
13 they could collect were \$110,000, wouldn't they have
14 realized that this was a suit that wasn't worth
15 pursuing? There would be no point in doing it because
16 nothing would be -- nothing would be gained for
17 Mr. McCutchen or for the attorneys.

18 MR. KATYAL: Not at all, Justice Alito. Two
19 things. One, the rule on ERISA -- and this rule has
20 been the rule in the Third Circuit since Federal Express
21 v. Ryan in 1996, this is a long-established rule -- if
22 an attorney comes and takes a case, knowing that there
23 is a -- an ERISA plan at stake, seems to me they're at
24 least on inquiry notice that there would be some
25 sort of --

1 JUSTICE ALITO: Well, perhaps they should
2 have realized it. But, if they realized it, they have
3 no incentive to pursue this litigation or to pursue the
4 tort decision --

5 MR. KATYAL: Not so. This is both in our
6 brief, as well as the Blue Cross amicus brief.

7 What usually happens in these situations is
8 that an agreement is struck in advance, before the
9 lawsuit is filed, between the plan and the plaintiff's
10 attorney to reach some accommodation. After all, the
11 plan has an incentive in some sort of action being
12 brought --

13 JUSTICE SOTOMAYOR: In this case, he
14 wrote -- the attorney wrote to you any number of times
15 and finally said, look, unless you come and tell me what
16 your position is, I'm going to go forward.

17 So what are attorneys supposed to do in
18 those situations, just drop the lawsuit?

19 MR. KATYAL: Your Honor, I don't think that
20 quite is an accurate statement of the facts. That was
21 precisely what the district court evaluated on the
22 summary judgment motion. They had made a big issue
23 about our failure to communicate and so on. The
24 district court rejected all of those arguments --

25 JUSTICE SOTOMAYOR: Rejected it because it

1 had nothing to do with the agreement, but it didn't
2 reject them as a factual matter, that you were
3 contacted.

4 MR. KATYAL: I do -- I do think that there
5 were lots -- and this is in Joint Appendix, pages 50 to
6 64 -- lots of communications between the two.

7 Now, here's -- there was one place where
8 there wasn't communication, which was they went and
9 negotiated a secret settlement of \$100,000. And when US
10 Air found out about it --

11 JUSTICE SOTOMAYOR: Counsel, were they
12 supposed to -- if the insurance limit was \$100,000, are
13 you suggesting that that was a bad-faith settlement?

14 MR. KATYAL: I am suggesting that we didn't
15 have the opportunity, Justice Sotomayor, that we
16 typically do in the lion's share of cases, as I was
17 saying to Justice Alito, where you work these things out
18 in agreement -- in advance with clear lines of
19 communication. And so --

20 JUSTICE KENNEDY: Justice Kagan's question
21 had two parts. She said, tell me about the two boxes,
22 subrogation and reimbursement.

23 I think there is quite a bit to your
24 argument that this is not subrogation. The plan is
25 rather confusingly drafted. The plan calls it

1 subrogation. I don't think it really means subrogation.

2 If it's not subrogation, Justice Kagan's
3 question was, what then? The -- the common fund rule
4 still does not apply? Because?

5 MR. KATYAL: Because the common fund rule --
6 and, this, we are in agreement on, the parties -- the
7 common fund rule is a doctrine based in unjust
8 enrichment. This is what they say at page 26. This is
9 what all the courts say common fund is.

10 And, indeed, up until six months ago, seven
11 different circuit courts had evaluated this question of
12 whether the agreement can trump the common fund
13 doctrine. 21 of 21 circuit court judges all said it
14 did.

15 JUSTICE KENNEDY: But you are still in
16 equity, pursuant to the statute.

17 MR. KATYAL: Yes.

18 JUSTICE KENNEDY: And are you saying that
19 there is no discretion in the equitable decrees that the
20 judge made?

21 MR. KATYAL: That -- that is precisely
22 right. The agreement sets the evaluation of the
23 parties. That's what the State Farm case says, what
24 their own treatise says, what the Arkansas Supreme Court
25 says.

1 JUSTICE SCALIA: That's -- that's not
2 unusual. The motto is equity follows the law.
3 Doesn't -- doesn't that usually -- isn't that usually
4 the case?

5 MR. KATYAL: That -- that is correct.

6 JUSTICE SCALIA: Where there is a legal
7 right, equity cannot overcome it.

8 MR. KATYAL: That is correct. And as the
9 Solicitor General says, at page 17, quoting the
10 Restatement, "A valid contract defines the obligations
11 of the parties as to matters within its scope, displacing
12 to that extent any inquiry into unjust enrichment." Any
13 inquiry.

14 If I could reserve the balance of my time?

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Palmore.

17 ORAL ARGUMENT OF JOSEPH R. PALMORE,

18 FOR UNITED STATES, AS AMICUS CURIAE,

19 IN SUPPORT OF NEITHER PARTY

20 MR. PALMORE: Thank you, Mr. Chief Justice,
21 and may it please the Court:

22 As this Court's cases recognize, Section
23 502(a)(3) invokes the equitable powers of the district
24 court. All of the remedial powers of a court in equity
25 are available that -- under Section 502(a)(3), that

1 would have been available when an analogous claim was
2 brought. And --

3 JUSTICE SCALIA: Equitable powers to enforce
4 the agreement?

5 MR. PALMORE: Yes.

6 And so we agree with Mr. Katyal in what
7 we've characterized as the first question presented,
8 that we think is essentially decided by this Court's
9 case in Sereboff.

10 At equity, when there was a -- an equitable
11 lien by agreement, that agreement was generally
12 enforceable according to its terms. It was like a
13 mortgage, is the classic case, and the mortgage gave a
14 security interest in land; and, if the debt was not paid
15 off, then the lienholder could -- could foreclose on
16 that land.

17 JUSTICE KAGAN: Mr. Palmore, do you agree
18 with Mr. Katyal's view of this distinction between
19 subjugation -- subrogation agreements and reimbursement
20 agreements and which this agreement is?

21 MR. PALMORE: I think that's a -- the --
22 there is certainly a distinction, and the Couch
23 Insurance treatise talks about the -- the distinction.
24 But the Couch Insurance treatise also explains that the
25 terms are often used interchangeably in a confusing way.

1 So I don't think that the bright line that
2 Mr. Katyal seeks to establish between subrogation and
3 reimbursement is necessarily reflected in all the cases
4 and all the --

5 JUSTICE SCALIA: Well, I think you can say
6 that about any legal rule, that some courts bollox them
7 up. I mean, that means the rule doesn't exist because
8 it's sometimes used in a confusing way?

9 MR. PALMORE: No, I think it's just the fact
10 that the courts do use these terms interchangeably.

11 JUSTICE SCALIA: What's the rule? What's
12 the rule? Do you acknowledge that that is the rule?

13 MR. PALMORE: We acknowledge that, when
14 there is a -- when there is a contractual plan-based
15 reimbursement provision like this, it is enforceable as
16 an equitable lien by agreement, in the same way that an
17 equitable lien by agreement would have been --

18 JUSTICE KAGAN: Well, but I think Mr. Katyal
19 said that, if this were a subrogation agreement,
20 Mr. McCutchen would have a much better argument because
21 a different set of rules would apply. And so that makes
22 this categorization question quite meaningful.

23 Now, you could say, well, we don't see it as
24 all that meaningful. We think, no matter what you call
25 this agreement, the same rules apply. Or you could say,

1 yes, different rules apply with respect to these two
2 different kinds of agreements, and your job is to figure
3 out which kind of agreement this is.

4 MR. PALMORE: Right. We think -- as the --
5 as the case comes to the Court, this is a case for
6 reimbursement. This is just like Sereboff, and this is
7 a reimbursement agreement.

8 What -- what adds to the confusion is
9 that -- and if you look at more modern insurance
10 decisions, they're bringing in all kinds of concepts
11 from State law, from insurance law, from public policy
12 of the State. They don't necessarily reflect what would
13 have happened in a court in equity at the time of the
14 divided bench, and that's the import --

15 JUSTICE BREYER: But that's my exact
16 question. I think, now, what we're being asked to
17 decide is, from your point of view, does the common fund
18 doctrine apply?

19 I take it the common fund doctrine says, if
20 this victim here got some money back from the person who
21 caused the accident, that that money goes into a common
22 fund, in the sense that those who share in the fund must
23 share as well in the cost of producing the fund.

24 So if it costs 50,000 to produce 100,000,
25 which is in the fund, that we have to have US Air, as

1 well, pay part of the cost of producing the fund. That
2 sounds very fair.

3 But I hear the argument, fair though it is,
4 we have here an agreement, and in this agreement, it
5 says, it's as if it said, and you shall not apply the
6 common fund doctrine or any other equitable doctrine,
7 such as he who seeks equity must do equity, etc. And I
8 think that's the question that's being asked.

9 And so what is your response to that? In
10 particular, why do you say the common fund doctrine
11 applies, though the contract says it doesn't, we assume,
12 but all these other equitable doctrines don't apply?

13 MR. PALMORE: Because we think the
14 equitable -- equitable doctrines that apply are the
15 equitable doctrines that would have applied at equity.

16 JUSTICE BREYER: Good. So now, we have 18th
17 century authority which says that, in the 18th century,
18 Lord Cooke or someone said that the common fund doctrine
19 applies, but the other doctrines don't. And the -- and
20 the name and citation to that authority is?

21 MR. PALMORE: Well, there is not one
22 authority that is going to give you both -- both
23 answers. But the equitable lien by agreement cases from
24 the time of equity, as I mentioned before, were
25 typically mortgage cases or a promise to provide future

1 acquired funds to discharge a debt.

2 And it's clear, under those cases, that that
3 could be executed, according to its terms. The unjust
4 enrichment principles that Respondent is invoking were
5 in a -- really a different silo involving equitable
6 restitution. And this Court in Sereboff said, we are
7 not going to look at equitable restitution principles,
8 we are going to look at equitable lien by agreement
9 cases.

10 Now, there is a separate line of authority
11 involving the common fund that we talk about in our
12 brief. And, as Mr. Katyal said, it has at times been
13 characterized as an unjust enrichment doctrine, but its
14 roots are different. Its roots are actually in an
15 analogy to trust law.

16 If you look back to the principal case that
17 established this, the Greenough case that we talk about
18 in our brief, the Court said that the -- Mr. Vose,
19 who -- the bondholder who had secured a benefit for all
20 the bondholders, had -- while not a trustee, had acted
21 the part of a trustee. And it was a well-settled
22 principle of trust law, both then and now, that a
23 trustee is entitled to reimbursement for reasonable
24 expenses from the trust itself.

25 JUSTICE SCALIA: Was there an agreement that

1 contradicted that?

2 MR. PALMORE: There was no agreement in --
3 in Greenough that contradicted that.

4 JUSTICE SCALIA: Well, but we have an
5 agreement here, so how does -- how does that line of
6 authority apply?

7 MR. PALMORE: Because, Justice Scalia,
8 I -- I --

9 JUSTICE SCALIA: We have an agreement, which
10 says that the insurance company gets all the money. So
11 you either say that that agreement can be overcome by
12 equity, or else, you -- you say the agreement prevails.

13 MR. PALMORE: There are two answers,
14 Justice Scalia. One is that -- that a plan can't add to
15 or subtract from the powers of the court in equity,
16 under Section 502(a)(3). A plan couldn't disclaim a
17 claimant's ability to get an injunction --

18 JUSTICE SCALIA: But it only has the powers
19 to enforce the agreement.

20 MR. PALMORE: The powers to enforce --

21 JUSTICE SCALIA: There are various equitable
22 powers, and it can use various of them to enforce the
23 agreement.

24 MR. PALMORE: But we don't think --

25 JUSTICE SCALIA: That's quite different from

1 rewriting the agreement, which is what you are using it
2 for here.

3 MR. PALMORE: No, we -- we are saying that
4 Section 502(a)(3) takes the settled powers of the court
5 in equity as it finds them. And the -- and the plan
6 can't divest the Court of those powers, it can't add to
7 those powers, like this Court held in Great-West; it
8 also can't take away from them.

9 But, if I could go to an equity answer,
10 because I think this is important --

11 JUSTICE SCALIA: Excuse me. Do you really
12 think that if -- if an equity court finds the agreement
13 to be unfair, it can say, he who seeks equity must do
14 equity, and rewrite the agreement, so that it's fairer?

15 MR. PALMORE: Not on general unfairness
16 grounds, but it was a settled principle at trust -- of
17 trust law, and remember, Greenough based the common fund
18 doctrine on trust law that if, for instance, a trust
19 document had said, the trustee shall take his expenses
20 from the trust corpus, not from the income -- or
21 vice-versa, says the trustee shall take his expenses
22 from the income, but not from the trust corpus -- if
23 that proved unworkable or unfair and the trustee
24 couldn't discharge his obligations to maintain the
25 trust, the court of equity had broad reformation powers

1 and was not bound by that trust document.

2 CHIEF JUSTICE ROBERTS: Counsel, the -- the
3 position that the United States is advancing today is
4 different from the position that the United States
5 previously advanced. You make their point in footnote 9
6 of your brief. You say that, in prior case, the
7 Secretary of Labor took this position. And then you say
8 that, upon further reflection, the Secretary is now of
9 the view -- that is not the reason.

10 It wasn't further reflection. We have a new
11 Secretary now under a new administration, right.

12 MR. PALMORE: We do have a new Secretary
13 under a new administration. But that --

14 CHIEF JUSTICE ROBERTS: I think it would be
15 more candid for your office to tell us when there is a
16 change in position, that it's not based on further
17 reflection of the Secretary. It's not that the
18 Secretary is now of the view -- there has been a change.
19 We are seeing a lot of that lately.

20 It's perfectly fine if you want to change
21 your position, but don't tell us it's because the
22 Secretary has reviewed the matter further, the Secretary
23 is now of the view. Tell us it's because there is a new
24 Secretary.

25 MR. PALMORE: Well, with respect,

1 Mr. Chief Justice, the law has changed since that brief
2 was filed nearly ten years ago in the Court's of Appeal.

3 And, of course --

4 CHIEF JUSTICE ROBERTS: Then tell us the law
5 has changed. Don't say the Secretary is now of the
6 view. It's not the same person. You cite the prior
7 Secretary by name, and then you say, the Secretary is
8 now of the view. I found that a little disingenuous.

9 MR. PALMORE: Well, I apologize for that,
10 Your Honor, but we do cite in that footnote the Amara
11 case, and that is a key element to our position here
12 because Amara said that Section 502(a)(3) incorporates
13 the traditional powers of the court at equity.

14 And it talked about, not only the ability to
15 issue an injunction, but the ability to provide for a
16 surcharge remedy, the ability to reform contracts --

17 JUSTICE SOTOMAYOR: The ability --

18 JUSTICE SCALIA: We never doubted that
19 before. Was it thought before that all the equitable
20 powers did not exist under ERISA?

21 MR. PALMORE: These cases weren't litigated
22 in the way they are now before -- before Sereboff --

23 JUSTICE SCALIA: It seems to be self-evident
24 that the court had all equitable powers. That's not a
25 change in the law. It's just a restatement of the

1 obvious.

2 MR. PALMORE: And we think the court has all
3 equitable powers and a plan term can't divest the court
4 of those equitable powers, so among those equitable
5 powers was the ability to enforce an equitable lien by
6 agreement without looking at inapplicable unjust
7 enrichment --

8 JUSTICE SOTOMAYOR: Or not to enforce it,
9 meaning the equity is to enforce it or to stay your
10 hand. And so the court could decide not to reach into
11 the pocket of the plan participant to pay back money
12 that the lawyer has.

13 MR. PALMORE: Well, we do agree with respect
14 to the common fund doctrine, and we think that, to the
15 extent this Court is willing to look at the -- at the --
16 the purposes of ERISA, that the position that we've
17 advanced strikes the right balance, and in particular,
18 it avoids the -- the negative recovery scenario that is
19 a particularly harsh result of Petitioner's position.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Wessler.

23 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

24 ON BEHALF OF THE RESPONDENTS

25 MR. WESSLER: Mr. Chief Justice, and may it

1 please the Court:

2 Reimbursement claims that are based on an
3 express subrogation agreement are subject to equitable
4 principles of subrogation.

5 In equity, these claims were governed,
6 according to the same principles that governed every
7 other type of subrogation.

8 JUSTICE SCALIA: Your opponent says this is
9 not a subrogation agreement, so that argument goes
10 nowhere. He would concede that point. You have to tell
11 us why this is a subrogation agreement, even though you
12 conceded below that it isn't.

13 MR. WESSLER: Your Honor, it is a
14 subrogation agreement. The claim, however, that
15 Petitioners have pursued here, is a reimbursement claim.
16 And -- but it's based on an express subrogation clause.

17 And in equity, reimbursement claims, which,
18 to be clear, are distinct from subrogation claims
19 because they involve a suit directly against the
20 insured, as opposed to against the tortfeasor, are
21 governed by the same principles of subrogation that
22 equity treated -- equity used that -- to apply to all
23 claims that involved an insurer who is seeking to
24 recover money from either an insured or a tortfeasor.

25 And so we concede, absolutely, Your Honor,

1 that the claim is one for reimbursement for monies
2 recovered out of a fund obtained by the insured. But
3 it's -- it's based on an expressed subrogation --

4 JUSTICE SCALIA: That's not what I say
5 you've conceded. That's the common fund doctrine. Your
6 opponent denies that the common fund doctrine applies.
7 And it says this is an equitable lien by agreement, so
8 that the common fund doctrine doesn't apply.

9 Now, you -- you say it is not an equitable
10 lien by agreement? Is that your position?

11 MR. WESSLER: No, Your Honor. We -- it --
12 to be clear, it is an equitable lien by agreement, but
13 it arises within the doctrine of subrogation, which is,
14 as Couch and Palmer and other treatises explain, is an
15 umbrella term that is used to describe all of the rights
16 and rules that govern claims by insurers for money back
17 after they've paid it out under a policy.

18 Now, the form of the action in this case is
19 a -- is a claim for reimbursement out of a fund, but the
20 mere fact that that's the form of the action, which, in
21 Sereboff, this Court called an equitable lien by
22 agreement, does not alter the underlying rule that
23 equity courts in the days of the divided bench would
24 have applied to the claim.

25 JUSTICE KAGAN: But doesn't Sereboff suggest

1 not? I mean, I realize that Sereboff has this footnote,
2 but if you read the text in Sereboff, it says, these
3 affirmative defenses that would arise in a normal
4 subrogation context are beside the point. So how are
5 they not the beside the point?

6 MR. WESSLER: They are not beside the point
7 for -- for one reason, and let me -- let me explain why.
8 What the Court actually said in Sereboff was that the
9 parcel of equitable defenses accompanying a
10 free-standing claim or free-standing action for
11 equitable subrogation are beside the point. A
12 free-standing action for equitable subrogation is not
13 one based on an agreement. It's an implied claim, a
14 claim for subrogation or reimbursement based on the mere
15 fact that the insurer has paid the money.

16 JUSTICE KAGAN: So is that true that, in
17 Sereboff, there was no agreement?

18 MR. WESSLER: There was, but what this
19 Court -- there was absolutely an agreement, just as
20 there is an agreement in this case. What the -- the
21 distinction the Court drew in Sereboff was it said that
22 whatever principles apply to free-standing claims are
23 beside the point, because -- precisely because the claim
24 was based on an agreement. That is absolutely correct.

25 And it's perfectly consistent with our

1 position because we believe that the principles in
2 equity that governed exactly the kinds of claims that
3 were at issue in Sereboff and are at issue here,
4 reimbursement claims based on an express agreement, are,
5 in fact, governed by the same principles of unjust
6 enrichment.

7 JUSTICE KAGAN: I guess I don't understand
8 that because it seems to me that, when Sereboff said it
9 was beside the point, they were refuting the arguments
10 that the insured party was making, that the insured
11 party was saying, hey, look, we have these great
12 defenses.

13 And -- and you are saying they had an
14 agreement, but they also said they have these great
15 defenses, and the Court said, too bad, those defenses
16 don't work for you here.

17 MR. WESSLER: The Court -- the -- the
18 beneficiary, Your Honor, in Sereboff, argued that the
19 defenses that applied to a -- a freestanding or implied
20 claim for equitable subrogation should control the --
21 the measure of relief available in the case.

22 They said -- it -- the contract doesn't
23 matter. The -- the agreement makes no difference. What
24 the plan is trying to obtain here is a pure,
25 freestanding claim for subrogation. And -- and look at

1 all these great rules that apply to that -- to that kind
2 of claim.

3 And the Court said, absolutely correctly, in
4 Sereboff, whatever those principles are doesn't matter
5 because this is a claim based on an agreement. And --
6 but what our view in this case is --

7 JUSTICE SOTOMAYOR: So what -- what's the
8 difference between the two? Meaning -- I take your
9 argument to be that the Court was right before, that
10 freestanding subrogation claims have one set of remedies
11 or rights, and subrogation, by agreement, have another.
12 So what do you see as the differences between the two?

13 MR. WESSLER: When it comes to the rules
14 that govern relief, there is no difference. The same
15 principle of unjust enrichment controls, and it limits
16 an insurer to recovering out of the fund
17 only --

18 JUSTICE SOTOMAYOR: So was the Court in an
19 exercise of futility, in writing what it did in
20 Sereboff?

21 MR. WESSLER: Not so, Your Honor. It did
22 not reach the question in Sereboff of what rules apply
23 to -- to reimbursement claims based on express
24 agreement. That was footnote 2.

25 The Court said, all we're holding in

1 Sereboff is this is a --

2 JUSTICE SOTOMAYOR: Counsel, I understand
3 the argument. It's a bit unsettling that you've got two
4 kinds of rights, one implied and one express, and
5 there's no difference between the two? You -- you've
6 got to give them a little bit more body to have a
7 persuasive argument.

8 MR. WESSLER: Your Honor, in equity, that
9 was the rule. And I'll point this Court's attention to
10 the leading treatise on equity. It's Palmer's treatise
11 cited by this Court in Sereboff and in Great West.

12 And what Palmer says -- and he -- he
13 discusses, precisely, this claim on pages 473 and 474 of
14 his -- of his treatise, and it's cited on page 21 of our
15 brief. And he says that, "The same principle of unjust
16 enrichment controls claims for reimbursement arising out
17 of an express agreement."

18 And I'm quoting here --

19 JUSTICE SOTOMAYOR: Isn't there another line
20 after that, that says something --

21 MR. WESSLER: Yes, I'm about to quote that.

22 And he says that that principle, quote,
23 "should serve to limit the effectiveness of contract
24 provisions which in terms provide for reimbursement out
25 of the insured's tort recovery, without regard to

1 whether or the extent to which that recovery includes
2 medical expense."

3 CHIEF JUSTICE ROBERTS: Is this the part --
4 I might be mixing this up with something else, but is
5 this the part where he says, unfortunately, the courts
6 don't agree with that?

7 (Laughter.)

8 MR. WESSLER: He -- he -- he identifies two
9 decisions -- that -- you're correct, Your Honor -- he
10 identifies two decisions, which did something contrary
11 to that rule. But, in his view, that is the rule that
12 governs these claims.

13 JUSTICE GINSBURG: Let's go back to what
14 the -- the simple argument. We have an agreement here,
15 and the plan is asking for what the agreement gives it.
16 Why is the plan unjustly enriched by receiving exactly
17 what the plan entitles it to receive?

18 MR. WESSLER: Because, Your Honor, these --
19 these insurance reimbursement cases arose in a very
20 different context from most other equitable lien by
21 agreement cases.

22 And the core difference in -- between these
23 cases and all 22 or -- or more of the cases that the
24 Petitioner cites, is that they involve a third party,
25 who has caused the loss both to the insurer and the

1 insured. And that third party, the tortfeasor, in these
2 reimbursement cases is not the defendant.

3 And so, in two-party equitable lien by
4 agreement cases, which are -- all of the cases that
5 Petitioner cites involve two-party cases in which the
6 defendant is also the wrongdoer, is the person who is
7 culpable and who has caused the -- the Plaintiff's loss.
8 In those cases, when courts awarded relief, they awarded
9 relief that was consistent with the defendant's unjust
10 enrichment, but was also co-extensive with or consistent
11 with the loss under the contract.

12 In these three-party cases, however, because
13 the defendant, who is -- who is a beneficiary, not --
14 not the tortfeasor, did not actually trigger the loss,
15 courts developed, in equity, a different set of rules to
16 apply to -- to measure the relief available under the
17 claim.

18 And what they said was, where there is a
19 fund that is insufficient, where it cannot cover all of
20 the losses suffered by all of the parties, that -- that
21 all of the parties must share equally with -- of the
22 loss. And the Palmer -- Palmer itself has an entire
23 chapter devoted to third-party problems. And --

24 JUSTICE BREYER: Why -- why is it so unfair?
25 I've been putting it in a way that looks unfair, which

1 favors your side. But US Air or the equivalent says,
2 now, here is the deal, we'll pay your medical expenses.
3 And now, if somebody causes those expenses, you come to
4 us, and we decide whether we want to sue and get our
5 expenses back, and any extra money, we give to you, and
6 we pay our attorneys' fees extra. They don't count
7 against the fund.

8 And if our lawyers tell us it isn't worth
9 it, you're free to sue; but, I'll tell you what, your
10 lawyer is going to be at the end of the queue. We're
11 first, then comes your lawyer, and anything left over
12 goes to you.

13 Now, if you can find a lawyer that takes it
14 on those conditions, good for you. But he might because
15 he might think he's going to get -- but our lawyers have
16 already told us it's not going to work, so that's the
17 situation.

18 Now, what's -- I'm not -- I think US Air's
19 point would be, well, what's unfair about that?
20 That's -- that makes sure we get our money back. That's
21 what we want to do. And you're free to sue; it's just
22 your lawyer who's going to come at the end of the queue,
23 okay?

24 What's -- why is that unfair?

25 MR. WESSLER: Your Honor, it's unfair

1 because, in equity, parties could not defeat the rules
2 that typically apply.

3 Now, if this were a legal case and that were
4 a legal claim, there's nothing unfair about that. The
5 parties can structure their contracts or agreements as
6 they see fit. But the fact is that we are talking about
7 the rules that equity applied in these situations.

8 JUSTICE SCALIA: So whenever you have a
9 contract that explicitly, although -- you know, nowadays
10 when the merged bars, I suppose, you wouldn't even have
11 to say it, but let's assume it explicitly says that
12 rights under this contract can be enforced in law or --
13 at law or in equity.

14 Whenever -- whenever you have a contract
15 like that, it's going to be up to the court of equity to
16 decide whether it's fair?

17 MR. WESSLER: No, Your Honor. I -- I don't
18 think that's right. And I would point the Court to --
19 to its decision in McKee in 1935, in which it drew a
20 distinction between a claim in equity that was a legal
21 claim based on a contract, which could happen, and a
22 claim in equity that was a, quote, "purely equitable
23 claim," based on the contract.

24 JUSTICE SCALIA: Why isn't this a legal
25 claim? It's -- it's a promise made in a contract.

1 Why -- why is that not a legal claim?

2 To be sure, the contract says that --
3 that -- you know, all equitable remedies are available
4 to enforce that claim. But why is it an equitable
5 claim, not a legal claim?

6 MR. WESSLER: It -- it could be either, Your
7 Honor. And we've cited -- cited to this Court cases
8 in -- in the days of the divided bench, in which a party
9 could have sought legal relief for breach for this exact
10 kind of claim, but there was also a remedy that a party
11 could seek in equity.

12 But in order to do that, in order to -- to
13 enter equity's doors on this reimbursement theory, it --
14 it had to agree to allow other parties their correlative
15 rights in equity, and it also had to agree not to
16 override or defeat the -- the rules in equity that
17 typically would --

18 JUSTICE GINSBURG: Well, couldn't that party
19 simply say, I want to go to the other side of the court?
20 You just made a distinction between the remedy at law
21 and at equity. This is the plan, and if the plan is
22 told, well, if you go to equity, you get all these extra
23 things. You could say, I'm asserting my rights at law.

24 MR. WESSLER: No, Your Honor. The -- the
25 plan is in a bind here. And we know this from Sereboff

1 and Great West and Mertens. They cannot seek legal
2 relief under this contract.

3 The only remedy -- the only provision in
4 ERISA's enforcement section that allows that is Section
5 502(a)(1)(b). And it says, a party has rights to -- has
6 the right to enforce the terms of the plan. But -- but
7 fiduciaries like Petitioner are not allowed to pursue
8 relief under that provision, so all they get is purely
9 equitable relief under 502(a)(3).

10 JUSTICE KENNEDY: The general rule in equity
11 was that the equity court would not give a specific
12 performance decree to pay a certain amount of money, was
13 the general rule. Were there exceptions?

14 MR. WESSLER: Your Honor --

15 JUSTICE KENNEDY: And -- and if so, do those
16 exceptions bear on this case?

17 MR. WESSLER: And there were -- there were
18 exceptions, but we don't view this case as a specific
19 performance case. And I'm not sure Petitioner --

20 JUSTICE KENNEDY: We -- you don't view the
21 case as?

22 MR. WESSLER: As a specific performance
23 case. That -- that was a specific type of -- of remedy.
24 The remedy here that's being sought is an equitable lien
25 by agreement, but -- but in our view, when an insurer

1 sought to enforce, through an equitable lien by
2 agreement, a claim or a lien on a fund, it must agree to
3 take that relief, subject to the way equity would have
4 treated the claim.

5 And what Palmer and what Couch and -- and
6 what the cases we've cited say is that, even for those
7 reimbursement claims that are based or arise on an
8 express agreement, that the relief available is limited
9 in two concrete ways.

10 The -- the insurer could not get more out of
11 the fund than its share of the fund that accounted for
12 the medical expenses it paid, and it must have agreed to
13 reduce proportionately for an amount of -- of fees and
14 costs.

15 JUSTICE BREYER: Enter best case -- what is
16 your best case? I'd love to find it. There's a case
17 that says something like this.

18 MR. WESSLER: The Svea case, Your Honor,
19 which is --

20 JUSTICE BREYER: Well -- well, let me tell
21 you what I'm thinking of. The -- there is a contract,
22 all written down. They forgot to put a seal on it.
23 They forgot to put a seal on it. So I guess it's now
24 1463 or some year like that. So they go into equity.

25 And now, they are in equity. And the

1 plaintiff says, judge, I want you to enforce this
2 contract. He says, I'm a judge in equity. He says, I
3 know, but we've agreed, and you enforce it in equity.

4 The contract says, give Smith all the wheat.
5 And equity says -- you know, there are other people who
6 would like some of this wheat, too, so we are not going
7 to follow the contract. We are going to modify the
8 contract according to equitable principles, which, as
9 you say, they can do. And the other side says, no, they
10 wouldn't. They'd follow the contract. They are just in
11 equity because they forgot the seal.

12 Okay. What is your best case to show they
13 did, indeed, modify it with the common fund doctrine or
14 some other doctrine? I want to be sure to read it with
15 a magnifying glass.

16 MR. WESSLER: Well, Your Honor, to be clear,
17 there is not a single equitable lien case that -- that
18 Petitioners have found in which a court has --

19 JUSTICE BREYER: I know, but I didn't ask
20 you about what they found. I was asking what you found.

21 MR. WESSLER: So -- so, Your Honor, the Svea
22 case, is -- is, I think, our best example. And in that
23 case, the insurer had a subrogation agreement, which
24 authorized it to recover -- authorized recovery to,
25 quote, "the extent of its payment" out of, quote, "all

1 rights of recovery of the insured."

2 And in that case, there was an underlying
3 settlement that the insured reached with the tortfeasor,
4 the wrongdoer. And after that occurred, the insurer did
5 not participate in that underlying proceeding at all.
6 And after that occurred, the insurer then directly sued
7 the insured.

8 This is exactly the kind of case we're
9 talking about here, seeking recovery out of the fund.
10 And they based that claim on their -- on their express
11 subrogation agreement. And they said, we paid
12 approximately \$3,000. You recovered something like
13 \$9,000. We should get \$3,000 back.

14 And the court there said, no, because the
15 fund was insufficient to cover all of the losses --
16 the -- the insured did not recover for all of its
17 losses, several other claimants did not recover for all
18 of their losses -- and the court said that, because the
19 fund was insufficient, the -- the insurer was limited to
20 recovering -- and I'm quoting here -- "no more than its
21 proportion of the amount recovered after deducting costs
22 and fees."

23 And so they applied both the double recovery
24 cap that we believe applied in every single case in
25 equity in which an insurer --

1 JUSTICE SCALIA: What -- what case is this?

2 MR. WESSLER: This is the Svea case, Your
3 Honor.

4 JUSTICE SCALIA: From what court, what --
5 what year?

6 MR. WESSLER: The highest court in Maryland,
7 I believe from 1901.

8 JUSTICE KAGAN: Mr. Wessler, would it be
9 fair to say -- I mean, we're in this unusual position
10 because we're supposed to be looking back to before the
11 1930s sometime.

12 Would it be fair to say that we just don't
13 have very many cases, and Mr. Katyal doesn't have any,
14 and you don't have any, that raise this question that,
15 where somebody walks into an equity court with a
16 contract, and we try to figure out whether the equity
17 court is going to use these unjust enrichment defenses?
18 Would it be fair to say that we just don't know?

19 MR. WESSLER: I -- I think -- I think that
20 it's fair to say that this did not arise that frequently
21 in courts of equity.

22 JUSTICE KAGAN: Why didn't it?

23 MR. WESSLER: Be -- for -- for several
24 reasons, Your Honor.

25 First, most of these claims arose simply as

1 freestanding or implied claims. So there was not --
2 there was no need for an insurer to include in its
3 insurance policy an expressed subrogation agreement.

4 However, that -- that changed approximately
5 around the turn -- the mid-20th century, when medical
6 insurance started to become an increasing commodity.
7 When that occurred, most States had a -- a prohibition
8 on the assignment of personal injury claims.

9 And so what insurers began to do to get
10 around that prohibition was to insert in their -- in
11 their policies an express clause allowing them to obtain
12 reimbursement from the insured, in the event that the
13 insured recovered money that it had paid.

14 Now, there is another reason in this case --
15 or in these ERISA cases -- why these agreements need to
16 be in the plan. And that's because Section 502(a)(3)
17 itself does not allow for a plan, like Petitioner, to
18 obtain a general right to equitable relief. All that
19 the Petitioner can -- can seek here is equitable --
20 appropriate equitable relief to enforce the terms of its
21 plan.

22 And so, in the absence of an expressed
23 provision, like a subrogation clause, it would not be
24 entitled to pursue a -- a general right to subrogation.

25 It's a term -- that back-end reference is

1 a -- is a term of limitation that limits the types of
2 claims that Petitioner can bring in these cases.

3 CHIEF JUSTICE ROBERTS: Counsel, can -- I
4 want to give you an opportunity to respond to the
5 argument that you've waived, the -- the -- your argument
6 based on the distinction between the summary of the plan
7 and the plan.

8 And there are two things that concern me
9 about that, in particular. The summary of the plan,
10 which you've had all the time, says, on page 1, "This is
11 only a summary. Complete plan details are contained in
12 a legal plan document. If there is any difference
13 between the information in the summary and the legal
14 plan, the legal plan" -- "the legal plan document will
15 govern."

16 So when you had the summary, you were on
17 notice that, if there were any difference between it and
18 the plan, the plan would govern. You received a copy of
19 the plan in June of 2012. Okay?

20 And as late as August 29th of 2012,
21 two-and-a-half months afterward, you filed a Joint
22 Appendix that didn't -- didn't contain the provision
23 that you say now governs. So why shouldn't you be held
24 to have waived that?

25 The first time we found out about that was

1 in your red brief that was filed -- June, July, August,
2 September -- three months -- October -- four months
3 after you had the plan.

4 So didn't you waive it?

5 MR. WESSLER: Well, I -- I don't think we
6 waived it, Your Honor. It's in our opening brief on the
7 merits to this Court, and --

8 CHIEF JUSTICE ROBERTS: Which was four
9 months after you had the plan and -- and the plan was
10 lodged with us last week for the first time.

11 MR. WESSLER: That's correct, Your Honor.
12 In our view -- and -- and I think I need to be clear
13 about this. I mean, the -- the fact that the plan
14 contains a different set of rights than -- than the SPD,
15 to us, is meaningful in -- in its -- in its effect that
16 it will have on this case when this -- if and when this
17 Court remands because -- because, in our view, the
18 rights are different.

19 However, I -- it doesn't change the
20 underlying nature of our argument, which is that, even
21 the strong form argument that Petitioners have made
22 here, which is that, on the SPD, it can defeat the --
23 the rules that typically would have applied, that equity
24 would not have allowed that. And so --

25 CHIEF JUSTICE ROBERTS: The problem is that

1 the district court interpreted the plan as precluding
2 the claim you're making here. And your argument that
3 that's not true is based not on the summary of the plan,
4 but on the plan itself.

5 MR. WESSLER: That --

6 CHIEF JUSTICE ROBERTS: And what the
7 district court does is it defers to the administrator's
8 interpretation of the plan. So the district court found
9 that the administrator's interpretation was not
10 arbitrary and capricious.

11 So what your friend is arguing is that,
12 well, you are kind of stuck with the district court
13 interpretation, and you can't, at the last minute, argue
14 that it shouldn't control because of some other
15 document.

16 MR. WESSLER: Well -- well, we think we do
17 have the right to argue that on remand, Your Honor.
18 And -- and this Court's decision in Cigna only -- only
19 arose in this case after the -- the briefs were complete
20 to the Third Circuit.

21 And so it's -- I -- I think Cigna has
22 changed the law to the extent that all parties are now
23 on notice and know that the plan document will trump any
24 contrary language --

25 CHIEF JUSTICE ROBERTS: Well, no, Cigna

1 didn't tell you that. The plan -- the summary told you
2 that. It says, "Complete plan details are in the legal
3 plan. If there is any difference between the summary
4 and the plan, the plan controls." So you didn't need
5 Cigna to tell you that.

6 MR. WESSLER: Well -- well, Your -- Your
7 Honor, I mean, I -- I think that the -- the -- you know,
8 that -- for us, that's an issue on remand. We're
9 comfortable that our arguments in this case control,
10 even -- even as it relates to the actual language in the
11 SPD and that -- and that whatever differences between
12 the SPD and the plan actually are don't necessarily
13 change the rules that govern when a -- when a party in
14 equity sought this kind of reimbursement relief directly
15 from -- from an insured.

16 I'd like, just -- just for the last minute
17 or so, to discuss the common fund rule because I do
18 think it applies as a separate and distinct rule,
19 regardless of how this Court interprets the agreement as
20 governing the rights between Mr. McCutchen, the
21 beneficiary, and the plan.

22 And I'd just like to point out that this
23 Court, in Pettus, made clear that the common fund
24 doctrine confers a separate lien on the attorney. And
25 so whatever the agreements control between the

1 beneficiary and the plan has, it cannot defeat the
2 rights that the attorney has, as a separate matter, to
3 come into court and invoke its own lien on the fund as a
4 first priority lien over the money.

5 And -- and I -- and I'd just like to point
6 out that Petitioners have not responded to that
7 argument. Nowhere in their reply brief did they explain
8 why their theory would allow them to defeat the rights
9 of a third-party defendant in this case, Mr. McCutchen's
10 lawyers, who have their own separate right to the lien.

11 And -- and none of their equitable lien
12 cases, Your Honor, involve any kind of common fund
13 whatsoever. So they say precisely nothing about the
14 rules that would have applied in equity to an attorney's
15 attempt to -- to take their proportion out of the fund
16 before it was distributed to any of the parties.

17 JUSTICE GINSBURG: I thought you were
18 discussing the common fund would be the allocation
19 between McCutchen and the plan. But now, you seem to be
20 talking only about the attorney's right to come in
21 first.

22 MR. WESSLER: The common fund, Your Honor,
23 applied either to deduct -- either as -- as a deduction
24 off the -- Your Honor, may I -- may I finish answering
25 the question?

1 CHIEF JUSTICE ROBERTS: Sure.

2 MR. WESSLER: As a deduction out of the
3 entire fund for the attorney's lien or it can be applied
4 to reduce proportionately each of the claimant's claims
5 to that fund. And in this case, it should be applied to
6 reduce a Petitioner's claim on the fund, irrespective of
7 McCutchen's own claim.

8 Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Katyal, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF NEAL KUMAR KATYAL

12 ON BEHALF OF THE PETITIONER

13 MR. KATYAL: Thank you.

14 I'd like to begin where -- where Mr. Wessler
15 left off, with the common fund, and make three quick
16 points.

17 The first is that both equity law and ERISA
18 law point in the same direction. Justice Scalia is
19 absolutely right, that they have zero cases that say, if
20 there's a preexisting agreement that settles the common
21 fund doctrine, that that makes it not enforceable.

22 And Justice Ginsburg's absolutely right to
23 say that when the plan -- the plan is not unjustly
24 enriched, to get the money that they are entitled to get
25 under the contract.

1 The second point I would make is that the
2 Solicitor General says, well, this is now --

3 JUSTICE SOTOMAYOR: Put on the back of
4 someone else, meaning --

5 MR. KATYAL: I agree.

6 JUSTICE SOTOMAYOR: -- I may or may not
7 agree that, in terms of your split with the participant,
8 the contract might control. But I still am having
9 trouble with understanding how you can bind a third
10 party, like a lawyer, who's done the effort to recover
11 that fund -- more along Justice Breyer's question, which
12 is not only in -- in all equity, lawyers are entitled,
13 whether by contract or by unjust enrichment principles,
14 to a -- to a percentage of their expenses in recovering
15 something.

16 MR. KATYAL: Justice Sotomayor, that's
17 precisely what cases like State Farm and the Arkansas
18 case from 1969, the Maryland case from 1931, address,
19 which is that situation. And the reason is that
20 essentially here -- it's a mistake to see this as a
21 third-party case.

22 This is really a situation created by
23 Mr. McCutchen double-promising the same money to two
24 entities, US Air and to his lawyers. And so it's
25 essentially a dispute, really, among two parties, not

1 three.

2 Now, the Solicitor General says, well, this
3 is rooted in -- in equitable doctrine. There is no case
4 that they have that says that there's some equitable
5 doctrine that trumps the preexisting agreement. And,
6 indeed, the case that they cite, the Greenough case, is
7 one that essentially relies on unjust enrichment
8 principles.

9 Sure, the Court has an equity power when to
10 remedy unjust enrichment. That is an inherent power of
11 the Court. We're not disagreeing with that. What we
12 are saying is that, when you have an agreement in
13 advance, that means, per se, there is no unjust
14 enrichment, that they are, to use this Court's language
15 in Sereboff, a defense that it is beside the point.

16 JUSTICE SOTOMAYOR: Counsel, I'm assuming,
17 because ERISA's in place now, that the many State laws
18 that prohibit this kind of agreement, where insurance
19 plans are seeking full reimbursement, despite an
20 attorney's efforts, that those are void, that those
21 would be enforceable.

22 MR. KATYAL: That is precisely --

23 JUSTICE SOTOMAYOR: The only one who can fix
24 this problem now is Congress, if they --

25 MR. KATYAL: That is correct.

1 JUSTICE SOTOMAYOR: -- if they perceive it
2 as a problem.

3 MR. KATYAL: Congress, in 1974, set it up
4 this way. And I think that that's an important point,
5 Justice Sotomayor. For 38 years, this Court has never
6 embraced an idea that Federal common law allows
7 rewriting of plan terms. It would be a very dangerous
8 doctrine to do so. It'd be standardless.

9 And here is a very vivid example: They are
10 saying that it is inequitable to have the Federal Blue
11 Cross/Blue Shield plan, which governs 4.6 million
12 people, including perhaps members of this Court, which
13 has the exact same provisions as the US Air plan, an
14 abrogation of common fund and a 100 percent
15 reimbursement provision.

16 And they are saying that that would not be
17 enforceable. That may create any number of problems for
18 the government, I imagine, when it tries to enforce
19 that.

20 JUSTICE BREYER: Suppose the expense weren't
21 to pay the lawyer. Suppose, in order to get the
22 100,000, you had, for example, to build a model car to
23 demonstrate to the manufacturer what caused the injury,
24 and it cost you 98,000 to do it. And they pay you
25 100,000.

1 You're saying that -- it wouldn't be unjust
2 to say the 100,000 has to go to -- back to pay US Air?

3 MR. KATYAL: Justice Breyer, if the
4 agreement settled that in advance, yes, it would not be
5 unjust. It is the agreement that controls.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Counsel.

8 The case is submitted.

9 (Whereupon, at 11:03 a.m., the case in the
10 above-entitled matter was submitted.)

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